82-1078

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES H. BROWN, III, - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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December ____, 1982.

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QUESTIONS PRESENTED FOR REVIEW

I.

Does it offend the Sixth and Fourteenth Amendments for a defendant's conviction to be principally based, over vigorous defense objection, on testimony regarding a novel "blood grouping" technique when the Commonwealth makes no showing that the technique has received scientific acceptance and when the Kentucky Supreme Court rejects the *Frye* standard and announces a new rule requiring no threshold showing?

II.

Does it offend the Sixth and Fourteenth Amendments when the trial counsel is denied *any* continuance to prepare to cross-examine a surprise expert testifying about a highly technical and novel "blood grouping" technique?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James H. Brown, III, respectfully prays that a Writ of Certiorari issue to review the opinion of the Kentucky Supreme Court entered on August 31, 1982.

OPINION BELOW

The opinion of the Supreme Court of Kentucky affirming petitioner's conviction is published. *Brown* v. *Commonwealth,* 639 S. W. 2d 758 (Ky. 1982) (Appendix to Petition, hereinafter A, 21-28).

JURISDICTION

The opinion of the Supreme Court of Kentucky was issued on August 31, 1982, and a timely petition for rehearing was denied November 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was jointly indicted with his brother, Mark M. Brown, in Mason County, Kentucky for the murder of Bryant Dudley (Transcript of State Trial Record, hereinafter TR, 1). The murder allegedly occurred on May 19, 1976 (TR 1). Petitioner promptly filed a discovery motion, requesting "results or reports" of all scientific tests, and the motion was granted (TR 27, 51-53). Several months later, right before trial, the prosecutor read of a new blood test in Playboy magazine (TE 134). He contacted the test's proponent, Robert Shaler, who performed his analysis over the weekend before trial. The prose-

cutor gave Shaler's phone number to defense counsel (TE 135). Counsel called Shaler to determine how to proceed. "I talked to Dr. Shaler, and at that time, he was still unwilling to testify. He said that his results at that time were not conclusive" (TE 135).

Trial began September 27, 1976. There was testimony that Mark Brown had been "ripped off of some drugs" and stated "he knew who had ripped him off and he was going to get them" (TE 3, 5). Mark also said he would "blow their head off" (TE 8). Robert Collins related that he told Mark he saw three people near his house the day of the robbery and Bryant Dudley was one of them (TE 11). Collins, Mark and petitioner picked up Dudley and went riding around; Mark, holding a .45 colt, asked Dudley if he robbed him, and Dudley denied it (TE 11). According to Dudley's girlfriend, the next night, May 18, Mark came and got Dudley so they could "do some chemicals" (TE 18-19). Several witnesses testified that they were at Mark's house that night from about 11:30 to 11:45 p.m. Mark and Dudley were in the kitchen high on drugs. Petitioner was in the living room and was not high. The witnesses left because the others were planning to go to Lexington (TE 21-3, 26-7, 30-2).

Bryant Dudley's body was discovered on a country lane nine days later (TE 34). He had died of two shotgun wounds to the back (TE 118). A police officer related that he talked with petitioner who told him he, Mark and Bryant were at Mark's house until 12:30 a.m. May 19, and then Bryant left and he and Mark went to Lexington. Several people recounted

that petitioner and Mark came to a Lexington apartment early on May 19. Petitioner had been there before and did not appear to be upset (TE 94-105). Petitioner traded boots and shirts with Roy Hutchinson (TE 105-8). Petitioner may have complained about the boots hurting his feet (TE 108). When Hutchinson discovered a stain on the boots, he turned them over to a policeman (TE 107).

Robert Collins testified that several days after Dudley disappeared he and Mark Brown searched for Dudley's body but could not find it. Collins stated that Mark said "he could not remember where it was, where they killed him" (TE 13).

At 10:00 a.m. the second day of trial the prosecutor handed defense counsel a report from Robert Shaler (TE 135). Sometime that day and prior to Shaler's testimony counsel moved for a continuance "of two to three days or, at least, until the next day, so that he could examine Mr. Shaler's report and consult with other experts about the blood testing procedures on which Mr. Shaler relied" (Supplemental Bill of Evidence, A 5). Counsel gave as grounds for his motion that "he could not properly cross-examine Mr. Shaler when he had only received Mr. Shaler's report that morning" (A 5). The colloquy and ruling on the motion:

> MR. GALLENSTEIN: What about my motion as to my being able to cross examine? Do I have to cross examine him this afternoon.
>
> THE COURT: Yes.

MR. GALLENSTEIN: Is there any way that I can proceed with my case, and have him called back? I may have to go to Lexington or go to Cincinnati to find out. I am totally unfamiliar with this.

THE COURT: You may let the record show that the testing was done last Friday, I believe. Is that correct?

DR. SHALER: The testing was conducted throughout the whole weekend. It was initiated on Friday.

THE COURT: Mr. Wood is not familiar with the situation, other than what he has learned. You are not familiar with the situation, other than what you have heard. (TE 135).

Petitioner objected to Shaler's testimony on the ground that the testing methods used by Shaler "are not generally accepted by Courts in the United States" and "the tests and methods are unknown" (TE 128). After conducting a hearing, the court ruled that Shaler could testify (TE 128-134). He then testified at length about the admittedly novel blood grouping theory he used and concluded that the blood on the boots could not have been petitioner's blood (TE 149). Shaler's new technique purported to distinguish various genetic markers (GM) in different blood samples. The analysis was performed on a small stain on the boots which was at least four months old and had not been preserved in any manner. Shaler also stated that the blood on the cutoffs and T-shirt removed from Dudley's body was of the same general type as the blood

on petitioner's boots and that approximately 4.6% of the population has that kind of blood (TE 148-9). This testimony was crucial since both petitioner and Dudley had type A blood (TE 109-113).

The Commonwealth's other evidence consisted of testimony that shot removed from Bryant's body was the same general type as that found in Mark's house and that the shotgun recovered from the Browns' mother's house (or any other 12 gauge, double barreled shotgun) could have fired the shot (TE 57-8, 62-3). Additionally, Jerry Conley, who was in jail with petitioner and Mark after they were arrested, said that Mark had offered him $1000 to kill Robert Collins so he could not testify, and petitioner agreed "with his head" (TE 81-2).

A directed verdict was denied (TE 167). Petitioner then called numerous witnesses who testified regarding his good reputation in the community (TE 170, 171, 172, 173, 174). Petitioner was described as "peaceful" (TE 173), "very quiet, very polite, very considerate" (TE 173), a "nice, polite, quiet young man" (TE 172), and "very peaceful" and "non-violent" (TE 175) by people who knew him well. The defense also called Jerry Muse, a Maysville police officer, who testified that he arrested Jerry Conley for disorderly conduct and public intoxication on July 22, 1976 (TE 177). Gerald Curtis, a police officer and part-time jailor, testified that Mr. Conley was in the jail for about two and a half hours on July 22, and that Mr. Conley's reputation for truth and veracity was "not very good" (TE 178-179).

Petitioner's renewed directed verdict motion was overruled (TE 186). The prosecutor gave a "probability" summation in which he attached random numerical values to the items of alleged "evidence" (most importantly the blood on the boots) and through wild speculation argued the "odds on innocence" as being over one in a billion (TE 199-202). During jury deliberations the foreman asked "[i]f the jury were to find the defendant at the scene but does not think that he shot the shotgun, how does that make the defendant." The question was not answered. Petitioner was convicted of murder and sentenced to twenty years imprisonment (TR 105). Final judgment was entered October 15, 1976 (TR 120).

Petitioner filed a timely Notice of Appeal. However, the Kentucky Supreme Court dismissed his appeal after denying his appointed counsel a second extension of time (principally to research the novel "blood grouping" question). After years of litigation in state and federal court, petitioner's appeal was finally heard by the Kentucky Supreme Court due to a federal court order. *Smith* v. *Brown,* 633 F. 2d 213 (6th Cir. 1980), decided sub nom. *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir. 1980), *cert. denied* 451 U. S. 1008 (1981) (Burger, C. J., Powell, J., dissenting).

Petitioner's conviction was affirmed. The Kentucky Court held that the evidence was sufficient to sustain the jury's verdict, Shaler's testimony was admissible ("the only valid argument to be made against the Shaler evidence is addressable to its credibility

rather than its admissibility") and petitioner was not "unfairly prejudiced" by the trial court's refusal to grant a continuance so that defense counsel could attempt to rebut Shaler's testimony (A 21-28). Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

I. This Case Clearly Presents a Question of Great Significance to the Administration of Criminal Justice: Whether the State Must Make Some Threshold Showing of Professional Acceptance of a "Scientific" Test Which It Introduces as the Principal Support for a Defendant's Conviction. The Kentucky Supreme Court's Decision That the Conclusions of any Alleged Expert are Admissible, Regardless of the Degree of Acceptance of His Test Among His Colleagues, Conflicts with the Decisions of Most State and Federal Courts.

A. CLEAR PRESENTATION OF IMPORTANT QUESTION

The issue this Court is asked to review was finely drawn in the courts below. As the trial judge phrased it:

> Mr. Wood, Mr. Gallenstein objects to the admission of Dr. Shaler's testimony on the grounds that the testing methods as used are unknown to Mr. Gallenstein and are not generally accepted by Courts in the United States. On the grounds that the tests and methods are unknown (TE 128).

After conducting a hearing, the court ruled that Shaler could testify (TE 128-134). The court's ruling was based solely on Shaler's assertions that the GM blood grouping test was reliable. No other expert testified, and there were no scientific studies other

than Shaler's unpublished research proposal available to the court. Shaler was being funded by an LEAA grant (TE 137). The whole question of the new technique's applicability to dried blood was ignored.

"Scientific" evidence is appearing more and more frequently in modern courts. As this Court is no doubt aware, there is a "misleading aura of certainty which often envelopes a new scientific test, obscuring its currently experimental nature," *State* v. *Stout*, 478 S. W. 2d 368, 369 (Mo. 1972). Because juries give so much weight to scientific evidence, courts must protect them from exposure to expert testimony of questionable reliability. This Court has not addressed the minimal due process requirements for introduction of "scientific evidence." Increasingly, criminal convictions are based, at least in part, on expert testimony. Because jurors often accept such evidence as infallible, this Court should give guidance to the lower courts about what threshold showing a party in a criminal case must make to admit proof of a scientific nature.

B. THE APPROPRIATE STANDARD—KENTUCKY IS IN CONFLICT WITH OTHER STATE AND FEDERAL COURTS.

The general rule in the United States governing the admissibility of expert testimony based on scientific tests or principles was stated in the leading case of *Frye* v. *United States*, 54 App. D. C. 46, 293 F. 1013, 1014 (1923):

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Some-

> where in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs.* (emphasis added.)

The *Frye* case has been cited by many courts, and is generally recognized as the case establishing the general principles governing the admissibility of new scientific tests. *See, e.g., United States* v. *Addison,* 498 F. 2d 741, 743 (D.C. Cir. 1974); *United States* v. *Stifel,* 433 F. 2d 431 (6th Cir. 1970), *cert. denied* 401 U. S. 994; *Huntingdon* v. *Crowley,* 51 Cal. Rptr. 254, 414 P. 2d 382, 388 (1966); *Commonwealth* v. *Lykus,* 327 N. E. 2d 671, 674 (Mass. 1975); *State* v. *Stout, supra; State* v. *Olderman,* 44 Ohio App. 2d 130, 336 N. E. 2d 442, 448 (1975).

However, the Kentucky Supreme Court has adopted, at least in this case, Dean McCormick's maverick position that "scientific" and other expert opinions should be admitted without regard to whether the alleged "science" has attained general acceptance in its field. McCormick, EVIDENCE 203 (2d ed. 1972). This is contrary to that Court's prior endorsement of the *Frye standard in Conley* v. *Commonwealth,* Ky., 382 S. W. 2d 865, 867 (1967) [polygraph tests] and *Merritt* v. *Commonwealth,* Ky., 386 S. W. 2d 727, 729-30 (1965) [truth serum tests]. The McCormick stand-

ard would permit anyone with a novel theory and some credentials to testify to his "expert" opinion by declaring his theory a reliable science. Obviously, both polygraphs and truth serum tests would be admissible since well qualified experts believe each is highly reliable. No doubt other even more questionable "sciences" would find their way into courtrooms.

The story of "paraffin" and "voiceprint" tests is instructive. Both tests were admitted by lower courts because their proponents, who were apparently qualified "experts" in their fields (like Mr. Shaler,) testified that the tests were reliable. *Commonwealth* v. *Westwood,* 324 Pa. 285, 188 A. 304 (1936); *Trimble* v. *Hedman,* 291 Minn. 442, 192 N. W. 2d 432 (1971). Each test was, like the GM blood test, in its infancy at the time it was admitted into evidence. Each was later discredited by impartial scientists and practitioners in the area. *Brooke* v. *People,* 139 Colo. 388, 339 P. 2d 993 (1959); *People* v. *Kelly,* 17 Cal. 2d 24, 549 P. 2d 1240 (1976).

Several important lessons should be learned from the paraffin and voiceprint debacles. First, no court should depend depend solely on the opinion of an "expert" whose career is dependent on advocating the reliability of his test. *People* v. *Kelly, supra; Commonwealth* v. *Topa,* 471 Pa. 223, 369 A. 2d 1277, 1281 (1977). Second, tests which appear "scientific" and even infallible may in fact be unreliable and invalid. "To discard the 'general acceptance' test for admissibility, as law professor McCormick had argued, might conceivably cause a repeat of the 'paraffin test' catas-

trophe of a few decades ago, where a great number of individuals were convicted on the basis of a 'scientific' test" later revealed to be "so unreliable as not to be usable even for investigative purposes." MOENSSENS, SCIENTIFIC EVIDENCE IN CRIMINAL CASES, SECTION 12.08 at 584 (2d ed. 1978). Third, examination of a new test by impartial experts to determine its validity and to develop standard procedures and qualifications for practitioners *before* the test is given the stamp of judicial approval is essential. *Id.*

Petitioner's argument is not an abstract one based on lofty but impractical legal principles of fundamental fairness. Shaler's crucial conclusion for the jury was that only 4.6 percent of the population, including Dudley, has the type of blood found on petitioner's boots. That conclusion was irresponsible, at best, and starkly demonstrates the danger of relying on one biased man's opinion that his test is reliable. Shaler's conclusion was based on blood sampling conducted on 2000 people in western Pennsylvania. He justified drawing his conclusion from the one sampling because "the caucasian population, as a whole, will have very similar statistics" (TE 160). The problems with his conclusion:

1. The victim was a Negro. Shaler's population statistics were thus irrelevant.

2. GM anitgens vary greatly in different populations and particularly different racial groups.

3. Shaler found that Dudley had GM(4). Only ½ of 1% of Negroes have GM (4).

4. Shaler found Dudley did not have GM (1). Most Negroes have GM (1).[1]

Thus Shaler's "expert" testimony, admitted solely because Shaler assured the judge his test was reliable, was highly questionable. While the *Frye* standard may not be constitutionally required, some threshold showing before admission of scientific evidence is surely mandated by the Due Process Clause. Permitting a witness to testify as an expert and sending a man to prison on the basis of his testimony is fundamentally unfair when the "expert" is the only proponent of his "field." Courts in other states have refused to admit similar blood tests under similar circumstances. *See Huntingdon* v. *Crowley; State* v. *Stout; People* v. *Alston,* 79 Misc. 2d 1077, 362 N.Y.S. 2d 356, 362 (1974). Kentucky's adoption of the McCormick standard in this case is in conflict with the decisions of most state and federal courts. It is also inconsistent with due process and the right to a fair trial. 6th and 14th AMENDS., U. S. CONST. This is an area that cries out for some guidance from this Court. Petitioner requests this Court to grant review and decide whether there in any minimum standard necessary for admitting scientific evidence.

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[1]Blanc *et al., The Value of Gm Typing for Determining the Racial Origin of Blood Stains,* 16 J. FOR. SIC. 176 (1971); Heneberg and Walter, *On the Genetics and Population Genetics of GM(4),* 26 HUM. HERED. 8, 11 (1976).

II. This Case Clearly Presents an Additional Question of Substantial Significance in the Administration of Criminal Justice: Whether Defense Counsel Must Be Granted a Continuance When He is Surprised at Trial by Expert Testimony Regarding a Novel "Blood Grouping Technique. The Decision of the Kentucky Supreme Court Conflicts with the Rationale of This Court's Decision in *Ungar* v. *Sarafite* and the Law in Most, If Not All, Jurisdictions.

Petitioner's defense counsel was forced to cross-examine Robert Shaler after no more preparation than glancing through his report. Shaler's theory was obscure and complex. His explanation of that theory was, to say the least, confusing to the laymen (and, perhaps, to many scientists):

> Q. 42. Just whatever you think will make the jury understand it, doctor.
>
> A. There are two kinds, two different ways to test the blood groups sustances [sic]. There is a direct test and indirect test. The inhibition test is an indirect test. The visualization of the test is positive when the substance is not present. The visualization of the test is negative when the substance is not present. I am sorry. It is negative when the sustance [sic] is present. What we look for in these tests is these red blood cells to come together. So I add a drop of an agent which is very expensive to the cell, to the blood stain or to the blood serum that I want to test, and if the red cells clumb together, in other words, form a mass, then I consider that to be a positive test. A positive test indicates that the substance, the GM Type that I am looking for, is not present. However, if I add my agent to the sample to be ana-

> lyzed, and I do not get the clumping of red blood cells, then that is considered a negative test, and that means the substance that I was looking for is present. So the indirect test is sort of a reversed test, known as an inhibition test. (TE 151-2.)

In spite of defense counsel's pleas for A) two or three days; B) a few hours or C) leave to recall Shaler later, the judge, opining that defense counsel knew as much about the test as the prosecutor, denied any relief. Counsel was compelled to cross-examine Shaler without delay and, for all practical purposes, blind.

Acknowledging that it was "at first somewhat disturbed by the trial court's refusal to grant a continuance in order for defense counsel to research the blood grouping theory," the Kentucky Supreme Court concluded that petitioner was not "unfairly prejudiced" by the denial of time to prepare, apparently because of the Saturday phone call (A 27-28). The Court's comment on the phone call was that "[a]t that time, Dr. Shaler indicated a hesitancy to justify, stating that his results were inconclusive." *Id.* The Court noted that counsel "was aware that Shaler might testify but made no continuance motion until he was called as the last witness and then failed to question him about the Saturday conversation." *Id.* That account of the facts is seriously inaccurate and the burden it places on defense counsel is grossly unfair. Shaler did *not* tell counsel he was *hesitant* to testify. He said he was *unwilling* (TE 135). Apparently, counsel did not hear of *Shaler* again until 10:00 a.m. the second

day of trial. He promptly moved for additional time to prepare to cross-examine Shaler but was overruled. What would the Kentucky court have had petitioner do? Ask for continuance at the beginning of trial because he might have to cross-examine a witness who said he was *unwilling* to testify? The Commonwealth was required by court order to turn over all scientific reports and did not do so until shortly before Shaler testified. If the prosecutor knew before then that Shaler would testify *he* should have informed defense counsel and the court. To place on conscientious defense counsel who was relying on his conversation with Shaler the burden of knowing (speculating?) that Shaler would testify *contrary to what Shaler had told him* is unconscionable. Counsel should not request a continuance until he learned that Shaler had changed his mind. His request for additional time was reasonable, in fact modest.

Petitioner was unquestionably prejudiced by having to cross-examine Shaler unprepared. In their research undersigned counsel have uncovered a wealth of information with which to raise serious questions about the validity of Shaler's tests and to destroy his "4.6 percent" conclusion. Trial counsel had nothing with which to confront the witness. While defense counsel elicited testimony that GM testing was in its infancy in this country, he was unable to score many other crucial points because he did not have the necessary information. The Kentucky Court's opinion gives the green light to prosecutors who wish to spring surprise "experts" on the defense to avoid knowledgeable

cross-examination. That is incompatible with the adversary system and the United States Constitution.

This Court has recognized that the denial of a continuance may be "so arbitrary as to violate due process." *Ungar* v. *Sarafite,* 376 U. S. 575, 589 (1964). The Court condemned "a myopic insistence upon expeditiousness in the face of a justifiable request for delay . . ." *Id.* Petitioner's case represents a gross miscarriage of justice. The Kentucky Court's opinion is inconsistent with the rationale of *Ungar* v. *Sarafite.* It is doubtful that any other jurisdiction would sanction the denial of confrontation and effective assistance of counsel demonstrated by this record. *See, e.g., People* v. *Wilson,* 397 Mich. 76, 243 N. W. 2d 257 (1976). Petitioner requests this Court to review the decision below, give teeth to *Ungar* and resolve the conflict with the law in other jurisdictions.

CONCLUSION

The present case presents two compelling constitutional questions. The administration of justice would benefit from a final resolution of both. For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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No.

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v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CERTIFICATE OF SERVICE

I, M. Gail Robinson, counsel for petitioner, certify that the attached Petition for Writ of Certiorari and Appendix was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543, and the counsel for respondent, Hon. Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this ____ day of December, 1982, by personally depositing same in a United States mail box, first-class postage prepaid.

M. GAIL ROBINSON
Assistant Public Advocate
Member, Bar of the
United States Supreme Court
Counsel for Petitioner

Subscribed and sworn to before me by M. Gail Robinson, this ____ day of December, 1982.

Notary Public, State at Large

My Commission Expires: _____